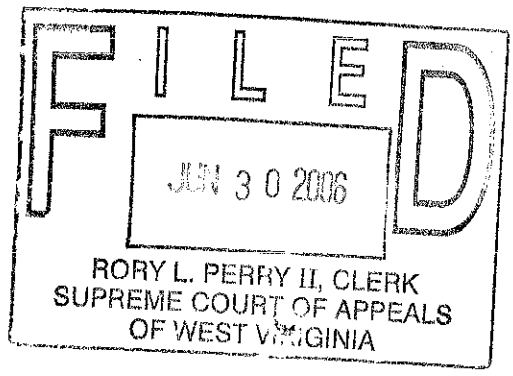
NO. 33055

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

TOMMY Y.,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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NO. 33055

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STATE OF WEST VIRGINIA,

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On June 23, 2004, the State of West Virginia filed a juvenile petition under West Virginia Code § 49-5-7(a)(1) in the Circuit Court of Clay County charging the juvenile[1] Respondent (hereinafter "Appellant") with four acts of delinquency (Case No. 04-JD-17): Assault on a School Employee (count 1), Brandishing a Deadly Weapon (count 2), Assault (count 3); and Reckless Driving (count 4).

A jury adjudicated the Appellant delinquent on counts 1 and 2 of the Petition. (R. 242-43.) Earlier, the juvenile court had dismissed counts 4 and 3. By Amended Dispositional Order dated June 1, 2005, the juvenile court ordered the Appellant placed in a secure juvenile detention facility for a definite period of six months for count 1, and one year for count 2, said periods of secure

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[1]The Appellant was born on November 26, 1986; he was 17 when he committed these acts. (R. 1-3.)

confinement to be served consecutively, and consecutive to one year upon a subsequent adjudication of delinquency for Destruction of Property.[2] (Case No. 04-JD-18.)

The Appellant appeals the Court's Amended Dispositional Order.

II.

FACTS

This was not a complex trial: The jury's verdict hinged upon its credibility assessments. The Appellant's assignments of error of irrelevant to the issue of guilt or innocence. In the summer of 2004, the Appellant learned that the Clay County School Board had decided to continue his placement at the Alternative Learning Center (hereinafter "ALC") for an additional semester.[3] (R. 519.) The Appellant attributed the board's decision, at least in part, to James Haynie, Assistant Principal of the Clay County High School, who had alleged that the Appellant "flipped him off" the previous spring.[4] (R. 482, 517.) After learning of the Board's decision the Appellant made several unsuccessful attempts to contact Mr. Haynie. (R. 517, 523.)

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[2]According to the record the Appellant committed this offense six days after committing the acts giving rise to the case at bar. (R. 63.)

[3]The ALC is a program for students who are not successful in a traditional classroom environment. *Board of Education of Lewis v. West Virginia Human Rights Com'n*, 182 W. Va. 41, 43, 385 S.E.2d 637, 639 (1989). The school board had placed the Appellant at the ALC because of disciplinary problems, with the promise that he would be permitted to reenter a traditional classroom setting if he avoided any more problems during the school year. (R. 485-86.)

[4]According to Mr. Haynie, sometime in the spring of 1994 he was working on the school's baseball field, when he observed the Appellant "flip him off." Although the record is not clear as to when he reported the Appellant's conduct, Clay County High School Principal testified that Mr. Haynie's report was the decisive factor in the board's decision not to take the Appellant out of the ALC for an additional semester. (R. 486.)

Both sides agree that the incident giving rise to Appellant's adjudication occurred on June 21, 2004, at Mr Haynie's residence in Maysell in Clay County, West Virginia. Both agree that the incident began when the Appellant followed Mr. Haynie's truck from a grocery in Clay to his home on Maysell hill. (R. 450, 517-18, 525.) Both the victim and his son testified that the Appellant tailgated them as they drove the country roads leading up the mountain to the victim's house. Both sides disagree as to what happened after they arrived at the victim's home.

Mr. Haynie testified he parked his truck at the bottom of his driveway. When he looked out his back window, he saw the Appellant "flip him off." (R. 453.) As he walked towards the Appellant 's truck, the Appellant angrily told him that he was responsible for the board's decision. As he came closer, Mr. Haynie noticed that the Appellant had a pistol in his hand which he repeatedly cocked and released. (R. 434, 454-55, 457, 474, 489.) While cocking and uncocking the pistol the Appellant told Mr. Hayine that he was thinking of wicked and evil things. (R. 455.)

The State proved that the victim was feared for his life. The Appellant tailgated him home, alternately speeding up and slowing down.[5] (R. 451-52.) Mr. Haynie described the Appellant's behavior as "intimidating," testifying that he believed the Appellant was going to shoot him. (R. 457-60.) He also testified that he feared for the safety of his family, particularly the life of his son David who was with him during the confrontation. (R. 460.) The victim's son corroborated his father's testimony. (R. 484-90.) After three or four minutes the victim told the Appellant that he was going back to work, walked back to his truck and drove off. (R. 470-72.)

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[5]The trial court dismissed the reckless driving charge because the State did not prove that the events occurred on a public highway. (R. 503.)

The Appellant conceded that he held Mr. Haynie responsible for the school board's decision. He also testified that Mr. Hayine's report to the board was a lie: that he had never "flipped him off." (R. 517.) He admitted that he followed Mr. Haynie to his house, and accused him of lying to the school board. (R. 518-19.) He claimed that Mr. Haynie told him that he got what he deserved. (R. 519.) The Appellant denied having a gun, and denied telling Mr. Haynie that he was thinking of "evil and wicked things." (R. 520-21.)

III.

PROCEDURAL HISTORY

On June 23, 2004, the State file a juvenile petition with the Clay County Circuit Clerk, alleging four acts of delinquency. (R. 1.) *See* W. Va. Code § 49-5-7(a)(1) (Juvenile petition shall be filed in the circuit court in the county where the conduct occurred.). On June 28, 2004, Juvenile Referee Wayne King temporarily transferred the Appellant to the Division of Juvenile Services' custody, and ordered that he be detained at a secure juvenile facility. (R. 23-26.) On July 16, 2004, after a preliminary hearing before the juvenile referee the Appellant's case was bound over to the juvenile court. (R. 66.)

On August 19, 2004, the court revoked the Appellant's bond after he, along with his father, was involved in yet another incident involving reckless use of a firearm. This time the victim was shot and seriously injured. The Appellant was alleged to have possessed the gun. (R. 80, 116-17, 155.) The court issued a pick-up order after the Appellant failed to appear at the revocation hearing. (R. 155-56.) The Appellant turned himself in on August 26, 2004, the court reset his bond and committed him back into the custody of the Division of Juvenile Services. (R. 84-85, 169-76.)

On September 23, 2004, a petit jury adjudicated the Appellant delinquent. (R. 242-43.) By order dated November 17, 2004, the trial court denied the Appellant's motion for a judgment of acquittal, and motion for a new trial. (R. 268.) By amended dispositional order dated June 1, 2005, the court ordered the Petitioner confined in a secure juvenile detention facility for two and one-half years. (R. 299.)

IV.

ARGUMENT

A. THE APPELLANT FAILED TO PRESERVE HIS OBJECTIONS TO ALLEGED DEFECTS IN THE JUVENILE PETITION.

1. The Standard of Review.

Both the Legislature and this Court require juveniles to raise objections based on defects in the charging document *before* the adjudicatory hearing. *See* W. Va. R. Crim. P. 12(b)(2) (Defenses and objections based on defects in the indictment must be raised before trial or they are waived.); *State v. Eddie Tosh K.*, 194 W. Va. 354, 357 n.4, 460 S.E.2d 489, 492 n.4 (1995) (per curiam) (Applying Rule 12(b)(2) to juvenile adjudications.) (citation omitted).

This Court has ruled that "[g]enerally the sufficiency of an indictment is reviewed *de novo*." Syl. pt. 2, *State v. Miller*, 197 W. Va. 588, 593, 476 S.E.2d 535, 540 (1996).

> Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails to timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Id., Syl. pt. 1.

2. Discussion.

The Appellant is asking this Court to overturn a jury verdict because the juvenile petition failed to allege that the acts in question occurred in Clay County, West Virginia; a fact he concedes to be true, and did not contest either before or during trial. He has failed to adduce evidence of prejudice or surprise, or asserted that his ability to defend himself was compromised. He has also failed to assert a cognizable constitutional argument. The Appellant was tried and convicted in the state and district where the acts of delinquency were committed. *See* U.S. Const. amend VI (Accused has right to trial in the state and district where offense took place.); W. Va. Const. art. 3, § 14 (Trials of crimes and misdemeanors, unless otherwise provided, shall be in the county where the alleged offense was committed.); W. Va. R. Crim. P. 18 (Unless stated otherwise venue lies where the offense occurred.). *See also In re Gault*, 387 U.S. 1, 13 (1967) (When loss of liberty is possible, essentials of due process apply in juvenile proceedings.). *But see State ex. rel. Juvenile Dept. of Marion County v. Smith*, 870 P.2d 240 (Or. App. 1994) (Alleging venue in a juvenile petition is not "one of the essentials of due process and fair treatment" required in juvenile proceedings under *Gault*.); *In re Interest of Leo L., II*, 606 N.W.2d 783, 785-786 (Neb. 2000) (No constitutional requirement to prove venue beyond a reasonable doubt in juvenile proceedings.).

The Appellant is asking this Court to nullify the jury's verdict because the State allegedly failed to tell him something he already knew, and does not contest. Indeed, although the rules explicitly require the Appellant to object to alleged defects in the charging document, the Appellant would have this Court adopt a new rule of law obliging the juvenile court to dismiss the petition *sua sponte*. This position flies directly in the face 12(b)(2)'s statutory mandate. *See* Syl. pt. 5, *State v.*

Wallace, 205 W. Va. 155, 156, 517 S.E.2d 20, 21 (1999) (West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings in West Virginia.).

The Appellee concedes that the State's petition does not allege that the acts in question occurred in Clay County, West Virginia. Counts 1, 2, and 3 allege that the acts in question occurred at Mr. Haynie's residence, but do not specify where the victim's residence is located. (R. 1-3.) Count 4 alleges that the acts in question occurred at Mr. Haynie's residence in Maysel, West Virginia, but does not state that Maysel is in Clay County. (R. 3.) At the adjudicatory hearing the State proved, and the Appellant conceded that Mr. Haynie's house is located on Maysel Hill in Clay County, West Virginia. (R. 64.) *See* Syl. pt. 4, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979) ("The State in a criminal case may prove venue of the crime by a preponderance of the evidence, and is not required to prove the same beyond a reasonable doubt.").

Initially, the Appellant seeks to absolve trial counsel of any responsibility to assert objections to the alleged defects in the charging document. Instead, he claims that the trial court was obliged to dismiss the juvenile petition *sua sponte* because it failed to allege that the incidents in question took place in Clay County, West Virginia. "The trial court, upon review of a [juvenile] petition, and prior to the commencement of a trial, *is obligated* to determine whether the petition is facially valid or whether it is facially defective." (Appellant's Pet. at 4; emphasis added.) The Appellant does not cite to a single legal precedent supporting his position. *See Tucker v. State*, 459 So. 2d 306, 308 (Fla. 1984) (Provision of Florida Constitution stating, that defendant has a right to trial in county where crime was committed does not mandate a statement of venue in the charging document.).

In fact, the rules of criminal procedure explicitly place the burden upon the *appellant* to object to a defective indictment *before* trial. *See* W. Va. R. Crim. P. 12(b)(2). This Court has held

that the appellant must follow the mandates of Rule 12(b)(2) when objecting to the sufficiency of a juvenile petition. *See Eddie Tosh K.*. 194 W. Va. at 357 n.4, 460 S.E.2d at 492 n.4. The Appellant's attempt to shift the responsibility for his own lack of diligence is wholly without merit, and should be summarily dismissed by this Court.

The Appellant next argues that he properly raised an objection to the sufficiency of the juvenile petition at the close of the State's case.

> It is important to recognize that at trial, counsel for the juvenile respondent moved the court to dismiss the petition *because it was facially insufficient*, that is, it was defective. The juvenile respondent's counsel argued that the basis of the facial insufficiency was that the petition failed to set forth the venue of the offenses. *The juvenile respondent did not argue that venue itself was improper.*

(Appellant's Pet. at 5; emphasis added.)

In other words counsel concedes that claim rests upon alleged facial insufficiencies of the petition, *i.e.*, deficiencies obvious to anyone who had read the petition. Because he failed to assert these objections before trial, the Appellant waived them. *See* 2 Wright, Miller & Cooper, Federal Practice and Procedure: Criminal 3d § 306 and cases cited at n.10 therein ("If improper venue is apparent on the face of the indictment. . . defendant is held to have waived venue by failing to object prior to going to trial. . . ."). *See also United States v. Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979) ("Where lack of proper venue is apparent on the face of the indictment, venue objections are waived if not made before trial."); *United States v. Polin*, 332 F.2d 549 (3d Cir. 1963) (Defendant required to raise venue objections apparent on the face of the indictment prior to trial.); *United States v. Jones*, 162 F.2d 72, 73 (2d Cir. 1947) (A defendant waives any errors apparent on the face of the indictment if he goes to trial without objecting.). There are two exceptions to Rule 12(b)(2).

At any time an Appellant may object to an indictment which fails to demonstrate the court's jurisdiction. *See* W. Va. R. Crim. P. 12(b)(2) (indictment which fails to demonstrate jurisdiction may be challenged at any time). Venue designates the geographic subdivision in which a court of competent jurisdiction may determine the case. It does not involve the power of the court to hear the case, but the propriety of that particular trial court to hear that particular case. *State v. Dennis*, 216 W. Va. 331, 342, 607 S.E.2d 437, 448 (2004); *Zanger v. State*, 548 So. 2d 746, 748 (Fla. App. 4 Dist. 1989)(quoting *Tucker v. State*, 459 So.2d 306, 308 (Fla. 1984)).

Absent a contemporaneous objection by a criminal defendant, a trial court sitting in the wrong venue retains jurisdiction to adjudicate a case at bar. Objections to venue itself, unlike those to the court's jurisdiction may be waived. *See Eddie Tosh K.*, 194 W.Va. at 357 n.4, 460 S.E.2d at 492 n.4; *United States v. Price*, 447 F.2d 23 (2d Cir. 1971), *cert denied*, 404 U.S. 912 (1971) (Venue objections are waived "when the indictment . . . clearly reveals [the venue] defect, but the defendant fails to object.").

Allegations of venue on a charging document serve the real and substantial due process interests of notice and fairness. But it would be anomalous for this Court to rule that a defendant may waive challenges to venue, but may not waive a challenge to allegedly defective allegations of venue in the charging document. This is particularly true when the Appellant concedes that venue was proper, and there is no proof of prejudice. *See United States v. Cotton*, 535 U.S. 625 (2002) (defects in indictments are no longer "jurisdictional," do not mandate reversal, and are amenable to harmless error analysis.); *but see United States v. Collins*, 372 F.3d 629 (4th Cir. 2004) ("If an indictment properly alleges venue, but the proof at trial fails to support the venue allegation, an objection to venue can be raised at the close of evidence.") (citation omitted).

A defendant may also challenge an indictment which fails to charge an offense. "The failure of an indictment to adequately state the essential elements of a criminal charge is a fundamental defect that may be raised at any time." *State v. Palmer*, 210 W. Va. 372, 377, 557 S.E.2d 779, 784 (2001). *State v. Miller*, 197 W. Va. 588, 598, 476 S.E.2d 535, 545 (1996). Venue is not an "essential element" of a criminal charge. Neither Rule 7(c),[6] W. Va. R. Crim. P., or West Virginia Code § 49-5-7(a)(1) require venue to be pleaded.[7] Since venue is waivable[8] it is not an essential fact

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[6]Rule 7(c), W. Va. R. Crim. P.

> (1) *In General.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . .

West Virginia Code § 49-5-7(a)(1)

> A petition alleging that a juvenile is . . . a juvenile delinquent may be filed by a person who has knowledge of or information concerning the facts alleged. Ths petition shall be verified by the petitioner, shall set forth the name and address of the juvenile's parents, guardians or custodians, . . . and *shall be filed in the circuit court in the county where the alleged* . . . act of delinquency occurred: *Provided,* That any proceeding under this chapter may be removed for good cause shown, in accordance with the provisions of section one, article nine, chapter fifty-six of this code. The petition shall contain specific allegations of the conduct, facts upon which the petition is based *including the approximate time and place of the alleged conduct*; a statement of the right to have counsel appointed and consult with counsel at every stage of the proceedings; and the relief sought.

(Emphasis added.)

[7]West Virginia Code § 49-5-7(a)(1) merely requires a statement as to the approximate time and place of the alleged conduct. Because a juvenile petition may be filed by any person having knowledge of the underlying conduct, not only by trained law enforcement, the statute is not meant to be read in an overly technical manner refining the phrase "approximate time and place" to encompass venue.

Each count of the petition, which was filed with the Clay County Circuit Court, states that the incident in question occurred at the victim's residence. This statement satisfies the "approximate time and place" statutory requirement, as these terms should be afforded their ordinary meaning.

constituting the offense charged. *See Rodd v. United States*, 165 F.2d 54, 56 (9th Cir. 1948) (Failure to raise venue objection before trial waives issue.); *State v. Eddie Tosh K.*, 194 W. Va. at 358 n.4, 460 S.E.2d at 493 n.4:

> Although a challenge to an indictment is never waived we . . . construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction charge an offense under West Virginia Law or the specific offense for which the defendant was convicted

The statutory distinctions between a juvenile petition and a criminal indictment further inform the Appellee's position. The purposes of the different proceedings are not the same. A juvenile proceeding is designed to rehabilitate the offender. In *State ex. rel. Juvenile Dept. of Marion County v. Smith*, 870 P.2d 240 (Or. App. 1994), the court ruled that the mandates of *Gault* are not all inclusive, and should be balanced against the purposes of the juvenile justice system:

> Thus, the constitutional procedures of a criminal trial that are vital to the process of fairness must be extended to juvenile proceedings so long as those procedures do not impede the purposes for which the juvenile system was designed.
>
> We do not believe that imposing upon the state in a delinquency proceeding the burden of proving venue promotes the juvenile systems primary goal of reformation of delinquent youth. . . .
>
> Proof of venue is immaterial to the determination of whether the child committed the charged act and is properly within the court's jurisdiction. Moreover, dismissal of a delinquency petition solely because the state proved venue would prevent the court from fashioning an order that would . . . start the child down the path of reformation.

Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 638, 17 S.E.2d 810, 811 (1941), *overruled on other grounds Lee-Norse Com v. Rutlidge*, 170 W. Va. 162, 291 S.E.2d 477 (1982) ("In the absence of any meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.")

[8]W. Va. R. Crim. P. 12(b)(2).

If, as this Court has stated, the primary purpose of a criminal indictment is fair notice, notice need not be restricted to the four quarters of the charging document. *See United States. v. Martin*, 411 F. Supp. 2d 370, 372 (S.D.N.Y. 2006) ("[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead a acquittal or conviction in bar of future prosecutions for the same offense.") (citations omitted). West Virginia Code § 49-5-7(a)(1) explicitly states, "The petition shall be verified by the petitioner, shall set forth the name and address of the juvenile's parents . . . , *and shall be filed in the circuit court in the county where the alleged . . . act of delinquency occurred.*" In the case at bar, the State filed the petition with the Circuit Court of Clay County, where it was received and stamped by the Clay County Circuit Clerk. These facts are plain from the face of the document. Within the context of the statute's venue provision, by filing the petition in Clay County the State placed the Appellant on notice, if not by word then by statutorily mandated deed, of its position regarding the proper venue.

B. THE APPELLANT FAILED TO PRESERVE HIS OBJECTIONS TO THE JURY PANEL.

The Appellant next argues that the trial court had an affirmative duty to strike, *sua sponte,* jurors SJ and BS from the jury panel. By failing to do so, Petitioner argues, counsel was *forced* to used two of his peremptories to remove them from the venire. (Appellant's Pet. at 10.)

The record of waiver in this matter is crystal clear. After conducting *voir dire* the trial court asked each side if they were satisfied with the panel, including jurors SJ and BS:

JUDGE: Would counsel approach? Any motions for cause? [Prosecutor]? [Defense Counsel]?

[DEFENSE COUNSEL]: (inaudible)[9]

JUDGE: Ok, I assume the jury is qualified. And how long does the parties need to strike the jury?

(R. 426-27.)

Decisions as to whether to strike a juror for cause are committed to the trial court's discretion. Therefore, if defense counsel wishes to strike a juror it is imperative that he notify the trial court in a timely fashion. *See State v. Burnette*, 583 N.W.2d 174, 178-79 (Wis. App. 1998) (Waiver rule justified by importance of trial court's contemporaneous impressions at the time of the challenge.) Defense counsel did not move to strike either juror for cause. He did use a peremptory on BS, but did not even peremptorily strike SJ. (See attached Ex. A.) By failing to ask the trial court to remove either juror for cause, and failing to strike juror SJ peremptorily, the Appellant has waived this assignment of error and any objections to either juror and are not properly before this Court. *See* Syl. pt. 2, *State ex. rel. Cooper v. Caperton*, 196 W. Va. 208, 211, 470 S.E.2d 162, 165 (1996) ("To preserve an issue for appellate review a party must articulate it with such sufficient distinctiveness to alert a circuit court of the nature of the claimed defect.").

C. THE APPELLANT'S FINAL ASSIGNMENT OF ERROR IS NOT RIPE FOR ADJUDICATION.

The Appellant's next assignment of error is premised upon pure speculation; it is clearly not ripe for appellate review. The Appellant claims that he might have been seen by some[10] unnamed

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[9]Although counsel's response was inaudible, the record demonstrates that he did not move to challenge either juror for cause. A motion for cause would have required a ruling; there was none. More importantly, defense counsel did not use one of his peremptory strikes to remove SJ. Thus, it is reasonable to believe that defense counsel did not challenge the juror for cause.

[10]The Appellant has attempted to supplement the record on appeal with a diagram of the Clay County courthouse. As this document was not introduced below, the Appellee respectfully objects

juror as he waited at the courthouse to begin the adjudication. Clearly, the trial court ordered the State to provide the juvenile Appellant with a clean set of clothing, and a shave before bringing him to the Clay County courthouse. There is no further corroboration in the record for the Appellant's contentions. There is no evidence from the juvenile, the detention facility, or the officers responsible for transporting the Appellant to and from court. There is no evidence as to the facilities policies, or whether the juvenile's behavior required restraints. *See In the Interest of Stanley*, 352 N.E.2d 3, 5 (Ill. 1976) (Defendant in a criminal case should not be required to appear shackled in a court room except when necessary and there are no other means available. The same rule applies to juveniles under *In re Gault*, 387 U.S. 1 (1967)). The Appellant does not claim that he was forced to remain shackled during his adjudicatory hearing. *See, e.g.*, Syl. pt. 10, *State v. Triplett*, 187 W. Va. 760, 762-63, 421 S.E.2d 511, 513-14 (1992) ("The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and then may appeal if relief is denied.").

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and requests that it be stricken from the record and that this Court summarily deny any other proposed supplements to the record on appeal.

V.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Clay County.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

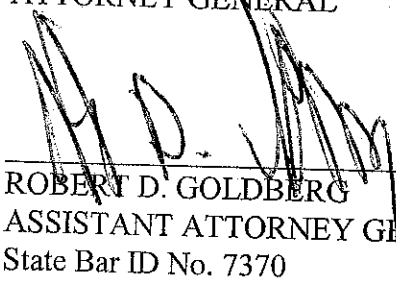

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EXHIBIT A

JULY TERM, 2004

STATE OF WEST VIRGINIA

VS.

TOMMY YOUNG, JR

04-D-17

September 22, 2004

VENIRE		JURY	9/23
~~1 Noah Gears Lacey Mc Brooks Bond~~		1 Larry Moore	✓
2 Elton Workman		2 Elton Workman	✓
3 ~~Jane Cunningham~~ Δ #1		3 William Deems	✓
4 ~~Barbara Sizemore~~ Δ #2		4 Karen Bird	✓
5 William Deems		5 Stacy King	✓
6 Karen Bird ~~Kenneth Neal~~		6 Jerry Bodkins	✓
7 ~~Thomas Burnside~~ Δ #3		7 James Fitzwater	✓
8 Stacy King		8 Kathy Johnston	✓
9 Jerry Bodkins		9 Thomas Coon	✓
10 James Fitzwater		10 Scott Rogers	✓
11 ~~Brandus Markle~~ Δ #6 ~~Carlie Starcher~~		11 ~~Sandra~~ Jones	✓
12 ~~Teresa McDivitt~~ Strk 2		12 Janet Harmon	✓
13 ~~Cheryl~~ Smith Δ #4			
14 Bryan Taylor Δ #5			
15 Kathy Johnston			
16 Thomas Coon			
17 Scott Roger			
18 Sandra Jones ~~Jake Pethtel~~			
19 ~~Kimberly Sams Patterson~~ ~~Tammy Vaughn~~ Strk #1			
20 Janet Harmon ~~Ernest Morton II~~			
	4		

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 25th day of June, 2006, addressed as follows:

To: Wayne King, Esq.
420 Main Street
P.O. Box 356
Clay, West Virginia 25043

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